

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Preemption of Local Zoning and  
Land Use Restrictions on the Siting,  
Placement and Construction of  
Broadcast Station Transmission  
Facilities

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MM Docket No. 97-182

To: The Commission

**COMMENTS**

Silver King Broadcasting of Massachusetts, Inc. ("Silver King"), by its attorneys, hereby supports the limited preemption by the Federal Communications Commission ("FCC") of local zoning regulations to the extent necessary to impose time constraints and certain basic procedural requirements on the approval (or disapproval) of communications tower construction. Silver King also endorses adoption by the FCC of a process by which parties may seek a declaratory ruling from the Commission with respect to the propriety of local zoning decisions on communications towers.

These procedural protections are necessary for *all* communications tower builders and users. In the Notice of Proposed Rulemaking in the captioned proceeding (the "NPRM"), 1/ the Commission focused on delays to

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1/ *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities*, Notice of Proposed Rulemaking, FCC 97-296 (Aug. 19, 1997).

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DTV implementation that could be caused by local zoning boards, 2/ but also sought comment on whether preemption provisions should be extended to tower construction for non-DTV facilities. 3/

The Commission cited concern that its construction schedule for DTV could be undermined by local zoning authorities' failure to approve DTV towers in a timely manner, 4/ but there is no reason to treat DTV facilities differently. Silver King urges the Commission to adopt rules that will apply to *all* communications tower construction. When local zoning boards fail to approve tower construction within a reasonable period of time, the Commission's objectives are undermined, whether the tower is needed for a new NTSC television station or a DTV facility. The Commission's objectives are certainly not served where an 18-month construction permit for a new station is issued, and a local zoning board fails to approve the tower construction during that period. Similarly, the Commission has an interest in ensuring that local zoning boards do not unreasonably obstruct the timely construction of towers where an applicant proposes to improve its facilities. Indeed, not only are delays in improved service contrary to the public interest, but if local boards delay action on these requests past the 18-month construction permit period, the permittee must seek an extension of time in which to complete construction -- an

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2/ *Id.* at ¶ 14.

3/ *Id.* at ¶ 16.

4/ *Id.*

application that requires the expenditure of limited Commission resources to evaluate and approve.

Silver King's own experience in dealing with a local zoning board in the absence of any federal timing constraints or procedural safeguards is a helpful example. As detailed in a Declaration of Mark Arpino, Chief Engineer for Silver King's Marlborough, Massachusetts station (attached hereto), Silver King struggled for three and one-half years to obtain approval from the Hudson, Massachusetts zoning board for approval of a replacement tower at the same site as its existing tower. The replacement tower was necessary because tower consultants advised Silver King that the existing tower would not be able to continue to sustain its current loading into the future. Silver King designed a replacement tower that would accommodate existing communications users as well as new users (to defray some of the costs of constructing the new tower). The board first denied Silver King permission to increase the height of the new tower from 1249' to 1454'. Silver King then went back to the drawing board and developed a significantly more costly proposal to rebuild its tower at the same site and the same height in a manner designed to satisfy the board. A year and one-half after the second application was filed (and after an initial denial of the second proposal, a court appeal and a remand proceeding), the zoning board grudgingly approved construction, but attached conditions to the approval that severally limit the number of antennas and reduce potential lease revenue on the tower. In other words, Silver King was granted permission to build a brand

new tower in approximately the same location and height as its old tower -- *i.e.*, with no possibility for improvements in coverage for its television station by virtue of increasing the tower height -- and its ability to recover the \$2 million cost of the new tower by leasing space to new users was severely limited, even though additional leases would not have materially altered the appearance of the tower.

During the time that Silver King was trying to obtain approval from the zoning board, the town was actively pursuing a legislative agenda that could ban all communications antennae from structures within city limits. This parallel proceeding forced Silver King to engage in two separate proceedings to have its property grandfathered, and thereby protected, from the new legislation.

During the course of this ordeal, Silver King personnel attended more than 20 formal meetings of local boards (not including informal contacts and court proceedings). It has cost Silver King -- to date -- approximately \$120,000 in legal and consulting costs and untold hours of work by station personnel. And the tower has not yet been constructed because the tower construction company still must get approval for a building permit.

Silver King supports the proposal in the *NPRM*. That is, local zoning boards should be given the first opportunity to approve or disapprove construction/modification of a communications tower, but the time in which they may conduct their review must be limited to a reasonable period. Silver King supports the time periods set forth in the *NPRM*: 21 days for modification of

existing towers; 30 days for construction of a new tower within 300' of an existing tower and 45 days for new tower construction. In addition, Silver King supports the proposal to require local authorities to issue written decisions based on substantial evidence and properly served on all parties within five days. Finally, Silver King supports the proposal to permit aggrieved entities to request a declaratory ruling from the FCC on the propriety of the local government's decision. These simple procedural safeguards proposed in the *NPRM* would have prevented Silver King's three and one-half year battle with a zoning board, and two court challenges.

In view of the delays in new service (or improvements in existing service) that may be caused by restrictive local governments, such as the extreme delays suffered by Silver King in Hudson, Silver King respectfully supports preemption of local zoning regulations for communications towers to the limited extent described above.

Respectfully submitted,

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Dated: October 30, 1997

## **DECLARATION**

I, Mark Arpino, Chief Engineer, Silver King Broadcasting of Massachusetts, Inc., General Partner of SKMA Broadcasting Partnership, licensee of WSHH-TV, Channel 66, Marlborough, Massachusetts, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

In February of 1984, Channel 66 Associates obtained a permit to build a 1249' broadcast tower and a building to house a television transmitter in Hudson, Massachusetts. The property is owned by the station and consists of approximately 20 acres that are zoned for industrial use.

In 1985, the Town of Hudson, where WSHH-TV and other communications companies maintain towers, amended its by-laws to prohibit communications towers in excess of 195' in overall height. This made the existing WSHH-TV tower a legal, non-conforming structure.

WSHH-TV was advised in 1991 by tower consultants that the tower should be replaced, not only because the tower could not accommodate increases in load, but also because the tower would not be able to continue to sustain existing loads in the future. The tower was built to meet the TIA/EIA RS-222C standard that was in effect in 1984. That standard has since been modified and current requirements are more stringent. In November 1994, WSHH-TV filed an application with the Town of Hudson to replace the existing tower and requested issuance of a Determination of No Hazard to Air Navigation from the Federal Aviation Administration.

WSHH-TV received a Determination of No-Hazard from the FAA to extend the overall height of the tower from 1249' to 1454' in July 1995. We hoped to improve our coverage by building a taller tower. Additionally, we planned to have some capacity to lease space to offset the cost of the project.

WSHH-TV attended four zoning board meetings between December 8, 1994 and January 12, 1995. We were met by a hostile zoning board and town residents determined to find a way to stop the tower from being replaced and seeking a means to banish even the existing tower from the town. We listened to many wild claims on the dangers of RF radiation and how interference from our station was a nuisance. One of the more exaggerated claims was made by a Hudson resident who stated that his computer monitor displayed our station, even when the monitor was turned off! We brought in experts to educate the board and residents on RF radiation issues. And we offered to come to individuals' homes to observe and resolve cases of interference. Unfortunately none of the residents or board members asked our experts any questions, and we received no takers for our offer to look into interference claims.

On January 12, 1995, the zoning board denied our request to replace the tower stating that "the 200' enlargement in height was a significant increase" and "adding any other antennas would be a change in use and a significant increase in use." WSHH-TV filed an appeal against the zoning board in Middlesex Superior Court shortly after the decision was certified.

WSHH-TV reassessed its proposal and decided to request a permit to replace the existing tower with one of the same height, even though this would limit the station's ability to improve coverage and limit potential lease revenue to offset the cost of the new structure. We decided to increase the face width of the tower by 1 foot from 7' to 8', both to improve the structural integrity of the tower and to ensure that transmission lines could be accommodated safely. WSHH-TV proposed to build the tower further back on the lot and reduce the quantity of guy wires from 8 levels to 6. These changes minimized the visual impact of the structure. In addition, we agreed to shorten the distance from the base of tower to the outer anchor by about 260', thereby reducing the overall footprint of the tower and, again, minimizing the visual impact on the area.

These changes significantly increased the cost of the project and provided no benefits to the station. The sole purpose of implementing these modifications was to satisfy the zoning board and residents of Hudson. We hoped this would increase our chance of receiving approval from the zoning board and expedite the procedure.

We filed a second application for a building permit on August 23, 1995 (to reflect this new proposal), and attended meetings on September 14, October 12 and November 9, 1995. On November 9, 1995, the ZBA denied our permit in summary fashion. The ZBA ruled "that the existing tower was not damaged or destroyed," referencing By-law 5.1.6.2, and therefore, section 5.1.6.1 of the local code "does not allow for the voluntary demolition of a non-conforming structure."

WSHH-TV appealed to Middlesex Superior Court once again shortly after the zoning board's decision was certified. The two appeals were consolidated into one trial with a date eventually set for July 1996. The Court's decision arrived in December 1996. The judge agreed with the zoning board's decision to deny the taller tower. As for the decision for a tower of the same height, the judge ruled the zoning board's decision was incorrect. The case was remanded back to the zoning board for further review with specific instructions to follow.

A zoning board meeting was held on February 13, 1996. The zoning board, under the judges' instructions, could not find grounds to deny our application but instead set conditions on the approval of the permit. These conditions limit the type and quantity of antennas that can be mounted on the tower to what was outlined on the application we submitted. This was a "bare

minimum" list of antennas to serve the station's future use. We cannot understand how the board assumed jurisdiction over equipment mounted on the tower, as equipment mounted to the tower is not part of "structure" that the board regulates and has control over.

We decided to accept the permit with the attached conditions. Had we chosen to fight the conditions, the board would have denied the permit and we would have been forced again to appeal the decision in court. The amount of time we would have spent waiting for a new trial and then the judge's decision could have meant more years of delaying the tower replacement. Our attorneys warned us that appealing the decision with the conditions carried some risk, should a different judge be assigned to the case.

Throughout the period described above, the tower was actively adding to its zoning regulations and local building codes. The town essentially wanted to prohibit any and all types of communication antennas. We believe this frenetic shoring up of zoning laws was undertaken with a single purpose — to make it economically infeasible for WSHH-TV to construct the replacement tower, and to drive the station (and all other communications lessees) out of town.

Our attorneys advised us to campaign against these proposed laws and to file for a "Form-A Subdivision" and a "Definitive-Subdivision" under local zoning laws. Obtaining the Form-A Subdivision approval was a quick and simple process. The Form-A would exempt our property from new zoning regulations for a period of up to three years.

Obtaining the approval for the Definitive-Subdivision was by far a more lengthy and complicated process. The approval we eventually received exempted the site for up to eight years from any new zoning by-laws. To obtain the Definitive-Subdivision approval, we were required to meet in front of the Planning Board, Zoning Board, Board of Health, Traffic Committee and the Department of Public Works. Most of the boards were satisfied after one meeting. However, satisfying the planning board involved attending more than a dozen meetings. Our subdivision engineer had to modify and revise his plans time and again to meet the board's last minute demands. He told us this subdivision was one of the most complicated projects he had ever been involved with.

From the date WSHH-TV submitted the first application to replace the tower, to the time it received the required approvals and certified decision allowing the permit, more than 3-1/2 years had passed. The legal cost ran well over one hundred and twenty thousand dollars and the amount of time spent by staff at the station was overwhelming.



WHSN-TV is currently in the process of selecting a manufacturer to supply and erect the tower. Once we award the contract we will need the tower supplier to provide a full set off technical drawings. We will bring the set of drawings to the building inspector's office. They can take up to 30 days to review the plans and then may request changes or specify how they want the tower to be built.

This, of course, may further complicate and delay the project.

Mark J. Arpino  
Mark J. Arpino  
Chief Engineer

Dated: 10/29/97